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Is There a Way Out of the Non- International Armed Conflict Detention Dilemma?

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I. INTRODUCTION

International humanitarian law (IHL) does not prohibit detention without charge or trial. So-called security detention is a well-established feature of war. On this point, there is no argument. Geneva Convention treaty provisions for international armed conflicts (IACs), or wars between States, explicitly recognize such detention authority.¹ Geneva Convention provisions for non-international armed conflicts (NIACs), or wars involving non-State armed groups, however, are silent on the matter of detention powers and therein lies a world of uncertainty.

States negotiating the text of the 1949 Geneva Conventions deliberately declined to extend to NIACs the rules applicable to IACs, including detention/internment² authority.³ 1977 saw the successful conclusion of negotiations of two protocols to the Geneva Conventions: Additional Protocol I covers IACs and Additional Protocol II covers NIACs.⁴ Additional Protocol I reiterates IAC detention powers concerning both combatants and ci-

1. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. GC III Article 4 defines prisoners of war and Article 118 requires their release “without delay after the cessation of active hostilities.” GC IV Article 4 defines civilians, Article 42 authorizes their detention “if the security of the Detaining Power makes it absolutely necessary” and Article 43 requires periodic review (of continued grounds for detention) at least twice yearly.

2. The terms detention and internment are used interchangeably to refer to deprivation of liberty by a party to an armed conflict.

3. II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 322, 465 (Federal Political Department Berne, 1951); II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 44, 49–50, 76–77 (Federal Political Department Berne, 1951).

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

vilians,⁵ and re-designates some previous categories of NIACs as IACs.⁶ Additional Protocol II, like the Geneva Conventions themselves, does not directly address detention authority. Thus, it is with some irony that a number of States now assert an inherent IHL-based right of detention in NIACs, as the UK government did in *Serdar Mohammed v. Ministry of Defence*.⁷

Some claim that if IHL neither prohibits nor authorizes detention in NIACs, then NIAC detention is permitted only where grounds and procedures are articulated in domestic law that conform with international human rights law. This assertion is attractive, however, for a number of reasons, both legal and practical, it allows for gaps in protection against arbitrary detention in modern conflicts.

First, States do engage in NIAC detention without criminal charge or trial, sometimes in the absence of explicit domestic legal authorization. Indeed, there are both military necessity and humanitarian imperatives to NIAC detention, which prevent the enemy soldier's return to the battle and, thus, encourage capture rather than killing. Second, States may—rightfully or wrongfully—deny the application of human rights law in armed conflict and/or to their extraterritorial conduct. Third, States may derogate from human rights treaty provisions prohibiting arbitrary detention in situations of national emergency, such as armed conflict. Fourth, transnational NIACs beg the question of whether a detaining State's laws can be applied to detention operations it conducts on the territory of another State. Fifth, non-State armed groups engage in detention, but cannot “legislate” in any presumed sense of that term, and, finally, non-State armed groups are generally understood not to be bound by human rights treaty provisions.

The judgment in the *Serdar Mohammed* brings these issues to the fore. Mr. Justice Leggatt decided that Mr. Mohammed's detention for over one hundred days on British military bases in Afghanistan violated Article 5 of the European Convention on Human Rights (ECHR).⁸ The Court found that Mr. Mohammed's detention did not fall within the exclusive list of

5. AP I, *supra* note 4, arts. 44 (re: prisoners of war), 75(3) (re: civilians).

6. *Id.*, art. 1(4).

7. *Mohammed v. Ministry of Defence*, [2014] EWHC (QB) 1369, [273], *available at* <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf> [hereinafter *Mohammed*].

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

permissible grounds for detention set forth in Article 5 and rejected defense arguments that the ECHR did not apply in this extraterritorial context. It also concluded that other legal sources—namely the UN Charter, Security Council resolutions, Afghan law, NIAC IHL authorized detention—did not comply with or trump the application of Article 5. The ECHR does permit derogation, including from Article 5, and conditions in Afghanistan may well have given rise to derogation powers, but no explicit derogation was asserted by the United Kingdom. Mr. Justice Leggatt’s decision was correct and demonstrates the need to fill legal gaps in the law related to NIAC detention.

This article will first explain why there is no inherent detention authority in either treaty-based or customary NIAC IHL. It will next address the arguments for and against relegation of NIAC detention powers to domestic law and human rights law. It will conclude with recommendations for legal reforms to fill the gap resulting from the absence of existing IHL detention authority and the inadequacy of applying domestic/human rights law.

II. NO IHL DETENTION AUTHORITY IN NIACS

A. Defining Terms, Locating Treaty Provisions

First, let us define terms. IHL is also known as the law of armed conflict, law of war and *jus in bello*. As embodied in the 1949 Geneva Conventions and their 1977 Additional Protocols, IHL addresses two topics: conduct of hostilities (means and methods of warfare) and protection of persons in the power of the enemy (those who do not, or who no longer, participate in hostilities). Detention/internment is part of the latter topic. Occupation law also involves protection of persons, but does not raise the type of liberty interests that arise when a person is detained or interned.

IHL also provides a rather bright-line distinction between rules of international armed conflict and rules of non-international armed conflict. An IAC is war between “high-contracting parties” to the Geneva Conventions, i.e., States.⁹ A NIAC is war between everyone else, namely between a

9. GC I–IV, *supra* note 1, art. 2 (often referred to as Common Article 2). Certain provisions of the Conventions are called “common articles” because they appear in each of the four. Some have argued that Common Article 2 does not define international armed conflict, but rather, merely establishes the class of international armed conflicts to which the Conventions apply. The debate is beyond the scope of this article, but suffice it to say

State and a non-State armed group, or between non-State armed groups. Contrary to the belief of some, an IAC is not the same as transnational armed conflict. An IAC may be fought exclusively on the soil of one State, while a war between State A and non-State armed group B fought on the territory of two or more States is still a NIAC. Thus, a transnational NIAC is still a NIAC.

NIACs were historically referred to as internal armed conflicts and the terms “non-international” and “internal” are sometimes still used interchangeably, albeit in error. Common Article 3 of the Geneva Conventions is the most significant treaty law for NIACs. It applies to “armed conflict not of an international character *occurring in the territory of one of the high contracting parties*.”¹⁰ In 1949 when the Geneva Conventions were negotiated, the application of international law to purely internal affairs—even war—was a revolutionary inroad into traditional notions of State sovereignty.¹¹ Also, little thought was given to the prospect of transnational NIACs. Today, Common Article 3 is understood to create a baseline of obligations for all armed conflicts, whether internal or transnational, whether international or non-international.¹² For this reason, all armed conflicts that are not IACs should be referred to as NIACs, not as internal armed conflict.

IAC rules are extensive, while NIAC rules are minimal, reflecting a traditional perspective on sovereignty: States are much more willing to establish international law rules for their mutual relations—even war—than for their internal affairs or their relations with non-State entities. Detention rules are a case in point. Virtually all of the Third Geneva Convention on prisoners of war and much of the Fourth Geneva Convention on civilians consist of extensive and detailed rules for who can be deprived of liberty, when and for how long, under what conditions and pursuant to what process in IACs. By contrast, Common Article 3 is the only provision of the Geneva Conventions explicitly applicable to NIACs. It covers treatment of

that the majority view is that Common Article 2 does, indeed, define international armed conflict. For a discussion of Additional Protocol I expansion of the Common Article 2 definition of international armed conflict, see *infra* note 21.

10. GC I–IV, *supra* note 1, art. 3 (emphasis added).

11. See, e.g., MALCOLM N. SHAW, INTERNATIONAL LAW 20–53 (4th ed. 1997) (re-shifting notions of the scope of application of international law).

12. See, e.g., U.S. Supreme Court case of *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), available at <http://www.law.cornell.edu/supct/html/05-184.ZS.html>. See also CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL Study].

persons *hors de combat* (including those deprived of liberty), but makes no mention of either grounds for or procedures applicable to detention.

Additional Protocol II to the Geneva Conventions, like Common Article 3, addresses only NIACs. It supplements Common Article 3, but applies only to NIACs in which the non-State armed group fulfills the criteria of Article 1.¹³ Also, and unlike the Geneva Conventions, which are universally ratified, there are several States that are not party to AP II.¹⁴ Given the degree of detail in AP II relative to Common Article 3, one might think that AP II would establish detention authority. But it does not, and for the same deliberate reasons that Common Article 3 does not. Both AP II and Common Article 3 presume that grounds and procedures for NIAC detention are purely a matter of domestic law.

B. Why No NIAC Detention Authority in the Geneva Conventions and Additional Protocols?

1. States *Don't* Want NIAC Detention Authority in IHL

As long as NIACs were thought of as purely internal, States had no desire and, in fact, no need for international regulation of grounds and procedures for detention. There are three reasons for this. First, as already noted, traditional notions of sovereignty weighed heavily against international regulation of internal matters.

Second, domestic law was—and is—fully capable of establishing detention authority through either criminal law or administrative law.¹⁵ Even today, international human rights law does not categorically prohibit “administrative detention” or “security detention,” which is understood to be detention without criminal charge or trial.¹⁶ It merely requires that such detention not be arbitrary. To enforce the right against arbitrary detention, human rights law requires States to afford independent judicial review, or

13. The criteria are that “dissident armed forces or other organized armed groups, which under responsible command, exercise such control over a part of its [the State concerned] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

14. There are 167 State parties to Additional Protocol II and 196 to each of the 1949 Conventions. *Treaty Database and States Party*, ICRC, <https://www.icrc.org/ihl> (last visited Jan. 4, 2015).

15. ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 459–60 (2013).

16. *Id.* at 460.

habeas corpus, to anyone deprived of liberty.¹⁷ Domestic law does not, of course, provide a basis for detention carried out by non-State armed groups in NIACs, but that is hardly a lacuna about which States are concerned.

Third, for reasons having to do with the rules for IACs, States have always feared that establishing NIAC detention authority in international law, rather than in domestic law, would anoint the non-State enemy with a status and rights that would impede the State's ability to use the full force of criminal law against those who illegally take up arms.¹⁸

This concern requires further explanation. IAC rules contain a unique "grand bargain." In war, combatants may target enemy combatants and other military objectives. A corollary to the right to target is the privilege of belligerency, otherwise known as combat immunity. In IACs only combatants (that is, members of the State's armed forces) are entitled to engage in lawful hostilities without risk of prosecution under generally applicable domestic law for crimes such as murder, assault, etc. (Of course, if they otherwise violate domestic or international law, for example by committing war crimes, such as targeting civilians, use of prohibited weapons, rape and pillage, they may be, and in some cases must be, prosecuted). States have long recognized combat immunity in IACs. Its logic is grounded in reciprocity: "I agree not to criminalize your soldiers who kill mine and you agree not to criminalize my soldiers who kill yours." State parties to armed conflict may, however, capture and detain members of the enemy forces to prevent their return to battle, but since that detention cannot be pursuant to criminal law another legal regime needed to be established. That regime is now embodied in the Third Geneva Convention, which addresses grounds, procedures, treatment and conditions of detention of prisoners of war.

This grand bargain-regime does not translate to NIACs. In NIACs at least one party to the conflict consists not of combatants in the technical sense of State armed forces entitled to the privilege of belligerency, but rather of civilian fighters. While IHL creates no impediment to participation in hostilities by civilians in either IACs or NIACs, it also provides them no immunity from criminal prosecution for their belligerent acts.

States, understandably, wish to maintain a bright line between privileges of belligerency in IACs and criminality of participation in hostilities in NI-

17. International Covenant on Civil and Political Rights art. 9(4), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

18. *See, e.g.,* DEBUF, *supra* note 15, at 452.

ACs. Because detention authority of enemy fighters in IACs is inextricably linked to the privilege of belligerency, States are loathe to cite IHL for detention authority in NIACs. They fear that it might amount to recognition of an insurgent group's belligerent status, either legally or politically.¹⁹ This fear is not irrational. It is fed, in part, by two existing provisions of IHL.

The first such provision is in the scope of application of AP I, which applies exclusively to IACs. Unlike the Geneva Conventions, AP I includes within the definition of IACs "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self-determination."²⁰ In other words, it transforms certain armed conflicts that would previously have been NIACs into IACs, thus triggering other IAC rules that anoint non-State fighters with combat immunity. This blurring of the distinction between IACs and NIACs, and the consequences therefrom, are at the heart of the United States (and some other States') rejection of AP I.²¹

The second such provision is a general one that recognizes a distinction between criminal acts of violence against the State below the threshold of armed conflict and those that rise above that level.²² Where such violence does rise to the level of armed conflict, IHL applies, and includes a requirement that States "endeavor to grant the broadest possible amnesty" to those who participated in hostilities against it.²³

Neither of these provisions necessarily means that recognizing detention authority in NIAC IHL will provide NIAC fighters with new status or privileges, but they do indicate a context that makes States' concerns understandable, if not legitimate.

19. *Id.*

20. AP I, *supra* note 4, art. 1(4).

21. *See, e.g.*, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUBLIC PAPERS 88 (Jan. 29, 1987), *available at* <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM>.

22. The terms "tensions and internal disturbances" are often used to distinguish conditions that fall below the threshold of armed conflict from those that amount to armed conflict. *See, e.g.*, Article 1(2) of Protocol II to the Geneva Conventions, which gives examples of such situations of tensions and internal disturbances, to include "riots, isolated and sporadic acts of violence and other acts of a similar nature."

23. AP II, *supra* note 4, art. 6(5); CIHL Study, *supra* note 12, r. 159.

2. States *Do* Want NIAC Detention Authority in IHL

While IHL instruments do not explicitly provide NIAC detention authority, three arguments have been put forth that such detention authority exists. First, some claim that this authority exists as a matter of customary IHL in NIACs. Second, it is argued that the authority to detain should be understood to exist as a “lesser-included” power of the right to target. Third, it should be presumed to be present by analogy to the explicit powers to detain both combatants and civilians in IACs.

a. There is No Customary IHL-based NIAC Detention Power

The vast majority of international law is comprised of treaty rules and customary law. We also speak of general principles of international law, but surely NIAC detention authority is not a general principle. As noted, it is also absent from the treaties that address NIACs: Common Article 3 and Additional Protocol II. Both the Conventions and the Protocol address detainee treatment obligations, and, therefore, are correctly said to presume detention in NIACs, but in stark contrast to the 1949 Conventions and Additional Protocol I, provisions for IACs which are explicit about the grounds and procedures for detention, the NIAC rules are silent. Consequently, support for the power to detain in NIACs outside the realm of domestic law must come from customary IHL.

The International Committee of the Red Cross (ICRC) is globally understood to be the world’s “guardian” of IHL.²⁴ In 2005, the ICRC published a comprehensive study of customary IHL applicable to both IACs and NIACs.²⁵ Contrary to the assertion of some of its detractors,²⁶ the study does not merely reflect the ICRC’s opinion, but rather its conclusions are based on a broad and deep analysis of State practice and *opinio juris*. The study identified 161 rules. Rule 99 concerns deprivation of liberty and recognizes an IHL-based power to detain in IACs, consistent with the articu-

24. See Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, ICRC RESOURCE CENTRE (Dec. 31, 1998), <https://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm>.

25. CIHL Study, *supra* note 12.

26. See Letter from John Bellinger III, Legal Adviser, U.S. Dept. of State, and William J. Haynes, General Counsel, U.S. Dept. of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), *reprinted in* 46 INTERNATIONAL LEGAL MATERIALS 514 (2007).

lation of grounds and procedures in the four Geneva Conventions. There is no such recognition for NIACs, except the observation that should a State party to armed conflict assert belligerent rights, captive fighters and civilians should be treated in accordance with the Third and Fourth Geneva Conventions, respectively.

By and large, States that do detain in NIACs do so pursuant to domestic law. The United States, for example, was quick to enact legislation authorizing the detention of “enemy combatants” once it began hostilities against Al Qaeda and the Taliban in Afghanistan,²⁷ choosing not to rely on a bald claim of customary IHL authority. Likewise, the UK’s military doctrine leans heavily on authority from the host nation’s domestic law or Security Council authorization for NIAC detention abroad.²⁸

Debuf’s comprehensive analysis of internment in armed conflict considers, but rejects the notion of customary IHL-based NIAC detention authority.²⁹ She first notes that if there were such authority, it would have to have emerged rather recently since the 1949 Geneva Conventions and their 1977 Additional Protocols reflected the view of a large majority of States that such powers are—and should be—left to the domestic legal order.³⁰ She concedes that custom may arise rapidly, but observes not only the lack of recognition of such authority in the ICRC’s 2005 customary IHL study, but also the lack of any relevant change in its August 2010 update.³¹ Second, Debuf observes that the development of a customary IHL basis for NIAC detention would have to have the “basic qualities” of law.³² These qualities include the articulation of grounds and procedures, as, for example, are articulated in the provisions of the Geneva Conventions and Additional Protocol I applicable to detention in IACs. Finally, Debuf notes the absence of an essential element to the establishment of customary law: State practice. While there are a few examples of NIAC detention in the

27. See Harold Hongju Koh, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/1/releases/remarks/139119.htm>) (“[W]e are resting our [Guantanamo] detention authority on a domestic statute—the 2001 Authorization for Use of Military Force (AUMF)—as informed by the principles of the laws of war. Our detention authority in Afghanistan comes from the same source.”).

28. DEBUF, *supra* note 12, at 472.

29. *Id.* at 469–73.

30. *Id.* at 470.

31. *Id.*

32. *Id.*

absence of domestic law, most States rely on domestic law and virtually none explicitly claim an inherent customary IHL basis.³³

b. Detention is Not a “Lesser Included” Power of the Right to Target

The attraction of the concept that if a person can be targeted he can be detained is manifest. Enemy fighters and even civilians while they directly participate in hostilities are well understood to constitute legitimate military objectives against which lethal force may be used.³⁴ Some have argued that in certain circumstances, at least, the power to detain is implicit in the power to use force.³⁵ There is also support for a preference, if not an obligation, to detain rather than kill where possible,³⁶ but that is not the majority view of the law today. It has been accurately noted that the absence of detention authority heightens the incentive to kill, but, still, most NIAC detention is pursuant to domestic law and there are very few instances of States detaining and claiming the legality of detention in NIACs in the absence of domestic law. Were there general acceptance of detention as a lesser-included power of the right to target, the reverse arguably would be the case.

Parties to armed conflicts have detained, and will always want to detain, not merely those who the law may permit them to kill, but a much broader class of persons who threaten their security. The explicit powers noted in the Geneva Conventions and AP I to detain combatants *hors de combat* and civilians who pose a definite threat to the detaining power in IACs are evidence of the power to detain even those who may not be targeted. Because

33. *Id.* at 471–72.

34. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

35. Ryan Goodman, *The Limits of the Logic that the Power to Kill Includes the Power to Detain*, JUST SECURITY (May 16, 2014), <http://justsecurity.org/10485/power-kill-includes-power-detain-limits/>.

36. Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 819 (2013). See also HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507 [2006] (Isr.), reprinted in 46 INTERNATIONAL LEGAL MATERIALS 373, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM. In this “Targeted Killing” judgment, the Israeli Supreme Court prohibited targeting of individuals that are capable of being detained, but appears to do so as a matter of policy as it does not cite to any provision or precedent in IHL.

the power to detain is not co-extensive with the power to target, the latter power cannot simply be asserted as a basis for the former.

More importantly, the choice between, on the one hand, IHL detention authority and, on the other hand, kill or release is a false one. The absence of IHL detention authority does not leave a party to armed conflict with no option but to either kill or release enemy forces or civilians who pose a security threat. Rather, it requires merely that detention be authorized under another legal basis. For most situations, domestic criminal law should suffice. In the context of contemporary NIACs, there's very little conduct that cannot be brought within the framework of domestic laws, including criminalizing those actual acts and inchoate offenses related to terrorism. The ability of States to establish and exercise extraterritorial jurisdiction in connection with such offenses is also well established. But where criminal law is unavailing, States may still legislatively provide for administrative detention so long as it satisfies minimum international legal requirements concerning grounds and procedures.

There are also practical distinctions between targeting and detention that militate against construing the latter power as included within the former. Targeting decisions culminate in so-called kinetic action that occurs at a point in time. While lawyers frequently are—and should be—involved, targeting determinations often must be taken on a moment's notice and with little opportunity for reflection or due process. Even where targets are decided upon through a deliberative process, the idea of *ex ante* independent review is fraught with problems.³⁷ *Ex post* review of targeting is reasonable and some would argue, necessary, but has its obvious limitations. Perhaps that is why there is no obligation of independent review of targeting decisions under IHL in IACs or NIACs. Detention, on the other hand, is ongoing and not only capable of being reviewed, but also required to be reviewed under both IAC and human rights law.³⁸ Detention in NIACs should be no different.

37. See Gabor Rona, *The Pro-Rule of Law Argument against a 'Drone Court'*, THE HILL (Feb. 27, 2013), <http://thehill.com/blogs/congress-blog/judicial/285041-the-pro-rule-of-law-argument-against-a-drone-court>.

38. In IACs, detainees are entitled to a review of whether they are combatants or civilians. GC III, *supra* note 1, art. 5. Civilians are entitled to a review of continuing grounds for detention twice yearly. GC IV, *supra* note 1, art. 43. For peacetime, and arguably for NIACs, see ICCPR, *supra* note 17, art. 9(4).

It has been argued that domestic law, such as the U.S.'s post-9/11 congressional Authorization for the Use of Military Force (AUMF)³⁹ and Security Council resolutions under Chapter VII of the UN Charter that reference the use of "all necessary means"⁴⁰ implicitly includes detention power.⁴¹ Whether such instruments do or do not authorize NIAC detention, they are distinct pieces of legislation that complement, rather than reflect applicable IHL. They cannot be said to amount to evidence of detention power as a subset of the IHL right to use force.

c. The Ills of Applying IAC IHL by Analogy

There is a wealth of IHL rules applicable to IACs and a paucity of such rules applicable to NIACs. Much of the gap is filled by domestic law. Again, it is because of the involvement of two or more opposing sovereign entities and the provision of combat immunity to members of their armed forces that much of domestic law cannot be said to apply to IACs, but these factors are not relevant to NIACs. The call to fill the rest of the NIAC gap has been met by the suggestion to simply apply IAC rules to NIACs by analogy. This suggestion is grounded in well-meaning efforts to supply humanitarian order to NIACs, which make up the vast majority of armed conflicts in the world today. There are, however, several reasons why this is a bad idea.

It is one of the more inescapably valid criticisms of its post-9/11 legal architecture that the United States has cherry-picked the Geneva Conventions, applying the provisions it likes while ignoring those it does not. For example, even while they continued to deny Guantanamo detainees prisoner of war status under the Third Geneva Convention, U.S. authorities asserted provisions of that Convention designed to protect prisoners of war from "public curiosity" as the basis for refusing release of videotapes of forced feeding.⁴²

39. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

40. *See, e.g.*, S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (Iraq); S.C. Res. 1510, ¶ 4, U.N. Doc. S/RES/1510 (Oct. 13, 2003).

41. *See, e.g.*, Koh, *supra* note 27, who cites both the AUMF and Security Council resolutions as providing legal authority to detain. *See also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004). This argument was made by the United Kingdom and rejected by the court in *Mohammed*, *supra* note 7.

42. *See, e.g.*, Abu Wa'el (Jihad) Dhiab v. Barack H. Obama et al., No. 05-1457 (GK), mem. op. at 28 (D.D.C. Oct. 3, 2014), available at https://s3.amazonaws.com/s3.documentcloud.org/documents/1308807/gtmo_videos_ruling_20141003.pdf.

The application of rules from one legal paradigm to another by analogy exemplifies such a cherry picking exercise, whether performed to deny or increase legal protections. As such, it has none of the essential indicia of law-making. Of course, parliaments and courts are not the only purveyors of law. States make international law by treaty and through establishment of custom as evidenced in State practice and *opinio juris*. For “IHL by analogy” to have the force of international law, it would need to be grounded in much more than the voice of human rights advocates. It would need to be grounded in advances in treaty or customary IHL. Unless accomplished through established law-making mechanisms, the suggestion of law by analogy is incompatible with the concept of rule of law.

III. THE PROMISE AND LIMITS OF HUMAN RIGHTS LAW AND DOMESTIC LAW

The complementarity of human rights and international humanitarian law—that is, the continued applicability of human rights law in situations of armed conflict—has been noted by many commentators, including this one, and more significant authorities, such as the International Court of Justice, the ad hoc tribunals for Rwanda and the former Yugoslavia, the UN Human Rights Committee and its special procedures mandate holders, the Committee against Torture, and various regional human rights monitoring and enforcement mechanisms.⁴³ This relationship is even more critical in NIACs than in IACs, as evidenced by the agreement of States party to Additional Protocol II that “international instruments relating to human rights offer a basic protection to the human person” in NIACs subject to

43. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9); U.N. Human Rights Committee, General Comment 29: States of Emergency (Article 4), ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); U.N. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. Doc. E/C.12/1/Add.69 (Aug. 31, 2001). For further support of the application of human rights law in armed conflict, see G.I.A.D. Draper, *The Relationship between the Human Rights Regime and the Laws of Armed Conflict*, 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 191 (1971); Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS 94 (1993); Raúl Emilio Vinueza, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, 1 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 69 (1998); RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); Hans Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 798 (2004).

the Protocol.⁴⁴ Common Article 3 also suggests the application of human rights law in NIACs. For example, it prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁴⁵ The provision does not explicitly reference human rights law, but where, if not in human rights law, may those indispensable judicial guarantees be found?

Human rights law does not prohibit administrative or security detention, which is understood to mean detention in the absence of criminal charge and trial. But it does burden detaining authorities and protect detainees in a variety of ways. The ECHR, which is directly in play in the *Serdar Mohammed* case, contains an exhaustive list of grounds for detention.⁴⁶ The determination that an individual is a fighter or security threat in armed conflict is not one of them. This omission is of no consequence in IACs, since the *lex specialis*, namely the Geneva Conventions and Additional Protocol I, contain explicit authority and procedures for detention. The NIAC *lex specialis* would also prevail over inconsistent or silent human rights law, but as previously noted, neither Common Article 3 nor Additional Protocol II contain any—let alone explicit—reference to detention authority or procedures. Other human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) do not contain a list of exhaustive grounds for detention, but do require that persons deprived of liberty be able to challenge their detention in a court. This right also gives way to IHL provisions applicable to IACs because the relevant IHL instruments are *lex specialis* in the context of IACs, and they contain procedures that contrast with those of the ICCPR. But for the same reason that the ECHR’s exclusive list of detention grounds continues to apply in NIACs, so does the right to challenge deprivation of liberty as provided for by the ICCPR.

That said, there are several obstacles and limitations to the application of human rights law in general, human rights law-based provisions of due process for detention in NIACs in particular, and even domestic law in some circumstances. As noted previously, States may—rightfully or wrongfully—deny the applicability of human rights law to armed conflict and/or to their extraterritorial conduct, and they may derogate from human rights treaty provisions prohibiting arbitrary detention in situations of national

44. AP II, *supra* note 4, pmb.

45. GC I–IV, *supra* note 1, art. 3.

46. ECHR, *supra* note 8, art. 5.

emergency, such as armed conflict. Additionally, transnational NIACs beg the question of whether a detaining State's laws can be applied to detention operations it conducts on the territory of another State. Furthermore, non-State armed groups are generally understood not to be bound by human rights treaty provisions and in any case, although they engage in detention, they cannot "legislate" in any presumed sense of that term. Finally, given the numbers of individuals potentially detained in armed conflict and the possible deterioration or disintegration of judicial resources, it may be impractical to provide detained fighters or security risks the due process guarantees promised by human rights and domestic law. What follows is a more detailed inspection of these obstacles and limitations.

A. Denial of the Application of Human Rights Law to Armed Conflict

The overwhelming weight of international jurisprudence has long accepted the application of human rights law in armed conflict.⁴⁷ The Convention against Torture is the only international human rights treaty that expressly applies to war, and makes no distinction between IACs and NIACs.⁴⁸ This gives fodder for opposing arguments: on the one hand, as evidence of human rights law's application in armed conflict; on the other hand, as evidence that if States want human rights law to apply in armed conflict, they can—and in the case of the prohibition on torture have—expressly so provided. Consequently, in instances where States have not explicitly provided for its application, human rights law does not apply. As previously noted, AP II is explicit and Common Article 3 is implicit in its application of human rights law to NIACs. The United States, which is not yet a party to AP

47. See, e.g., U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT, at 5–6, U.N. Doc HR/PUB/11/01, U.N. Sales No. E.11.XIV.3 (2011), available at http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf ("For years, it was held that the difference between international human rights law and international humanitarian law was that the former applied in times of peace and the latter in situations of armed conflict. Modern international law, however, recognizes that this distinction is inaccurate. Indeed, it is widely recognized nowadays by the international community that since human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of war, international human rights law continues to apply in situations of armed conflict.").

48. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

II, has recently softened its absolutist denial of the application of human rights law in armed conflict.⁴⁹

Even when it is accepted that human rights law can apply in situations of armed conflict, differing perspectives on the application of the *lex specialis* doctrine lead to opposing visions of the complementarity of IHL and human rights law. One view, that Professor Beth van Schaack calls “strong *lex specialis*” (which I prefer to call “framework exclusion”) posits that wherever IHL applies, human rights law does not.⁵⁰ Another stance, that van Schaack describes as “weak *lex specialis*” (and that I prefer to call “rule exclusion”) maintains that wherever IHL supplies a relevant rule, the parallel human rights law provision has no application.⁵¹ This is the view embodied in the concept of complementarity between the two branches of international law. Yet another view, held by Professor Noam Lubell, finds flaws in the application of the *lex specialis* concept as a whole.⁵²

Because the vast majority of international legal thought accepts complementarity (“weak *lex specialis*” or “rule exclusion”), the denial of application of human rights law to armed conflict is becoming more of an historical artifact than a present-day problem.

49. See, e.g., Beth van Schaack, *United States Report to the UN Human Rights Committee: Lex Specialis and Extraterritoriality*, JUST SECURITY (Oct. 16, 2013), <http://justsecurity.org/1761/united-states-lex-specialis-extraterritoriality/>.

In its report, the United States says:

With respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or “IHL”), the United States has not taken the position that the Covenant does not apply “in time of war” Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application. To cite but two obvious examples from among many, a State Party’s participation in a war would in no way excuse it from respecting and ensuring rights to have or adopt a religion or belief of one’s choice or the right and opportunity of every citizen to vote and to be elected at genuine periodic elections.

U.S. Department of State, Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶ 506 (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179781.htm> [hereinafter Fourth Periodic Report].

50. Beth Van Schaack, *The Interface of IHL and IHR: A Taxonomy*, JUST SECURITY (Oct. 8, 2013), <http://justsecurity.org/1741/interface-ihl-ihr-taxonomy/>.

51. *Id.*

52. Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 737 (2005), available at https://www.icrc.org/eng/assets/files/other/irrc_860_lubell.pdf.

B. Derogation

The ICCPR, ECHR and American Convention on Human Rights all enable State parties to derogate from certain of their obligations in times of national emergency.⁵³ The African Convention on Human and People's Rights has no derogation provision.⁵⁴ The treaties that do provide a right of derogation also enumerate provisions that are not subject to derogation, such as the right to life. Protections against arbitrary deprivation of liberty and provision of judicial guarantees are not among the non-derogable rights in any of the human rights treaties. Therefore, the argument that human rights law can and does fill in where IHL is silent is imperfect. For this reason, there is some attraction to the position that IHL contains not only an inherent detention authority, but as a consequence, must also be understood to contain protections akin to the judicial guarantees of human rights law. On the other hand, the expressed view of State parties to these human rights instruments, as set forth in the derogation provisions, is that they may withhold judicial guarantees against arbitrary detention in times of national emergency. And what more obvious example is there of national emergency than war?

C. Denial of the Application of Human Rights Law to Extraterritorial Conduct

Do States have human rights law obligations when they operate outside their borders? The most expansive view would be that they do wherever they operate. But that is not the law. The first analytical waypoint is the treaty language. The ECHR purports to apply to "everyone within . . . [the] jurisdiction" of a State party.⁵⁵ The ICCPR, on the other hand, purports to apply "to all individuals within its [the State party's] territory and subject to its jurisdiction."⁵⁶ On first blush, it would appear that while the ECHR applies extraterritorially to the extent a State party exercises jurisdiction beyond its own borders (for example, in maintaining a NIAC detention facility), the ICCPR applies only on the territory of a State party. However, the word "and" in the ICCPR provision just cited has been the subject of

53. ICCPR, *supra* note 17, art. 4; ECHR, *supra* note 8, art. 15; American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

54. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, *reprinted in* 21 INTERNATIONAL LEGAL MATERIALS 58 (1982).

55. ECHR, *supra* note 8, art. 1.

56. ICCPR, *supra* note 17, art. 2(1).

much debate. The United States has long argued that “and” is meant to be applied conjunctively. In other words, the individual must be both within the United States and subject to U.S. jurisdiction. Other authorities read “and” disjunctively. They consider that the ICCPR applies to individuals either in the territory of the State party, or when and wherever the individual is subject to the State party’s jurisdiction. The latter, disjunctive interpretation brings the ICCPR’s scope of application in line with that of the ECHR. Although, the U.S. historic rejection of extraterritorial human rights obligation has softened, the details of its new position are unclear.⁵⁷

Even where human rights law obligations are not restricted to the territory of a State party, their scope of application remains uncertain. The European Court of Human Rights has advanced our understanding of when a State party exercises jurisdiction for purposes of application of the European Convention, albeit imperfectly. In *Banković*, the Court took a rather limited view of extraterritorial application, ruling that aerial bombing of a foreign country did not constitute the exercise of jurisdiction where the State party does not exercise “public powers” of government.⁵⁸ Subsequently, in *Al Skeini*, the Court applied the Convention more expansively to wherever a State party exercises “effective control” over the individual, but the Court did not explicitly overrule *Banković*.⁵⁹ The Human Rights Committee has also endorsed the “effective control” standard for the ICCPR, but the United States continues to maintain a rather strict position against extraterritorial application. Interestingly, the United States did recently inform the Committee against Torture that it now construes the obligation to refrain from engaging in cruel, inhuman and degrading treatment pursuant to Article 16 of the Convention against Torture to apply to “places a government controls as governmental authority.”⁶⁰ It is not yet clear whether this means significantly more than “on its territory,” as the U.S. statement explicitly noted that this would include Guantanamo, but made no mention of, for

57. Fourth Periodic Report, *supra* note 49.

58. *Banković and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333, reprinted in 41 INTERNATIONAL LEGAL MATERIALS 517 (2002).

59. *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011), available at <http://www.bailii.org/eu/cases/ECHR/2011/1093.html>.

60. Mary E. McLeod, Acting Legal Adviser, U.S. Department of State, Address to the Committee on Torture: U.S. Affirms Torture is Prohibited at All Times in All Places (Nov. 12–13, 2014) (transcript available at <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>).

example, Bagram airbase in Afghanistan or other places where the United States has engaged, or may engage, in detention operations.⁶¹

In sum, while the trajectory of international human rights law appears to be toward greater scope of extraterritorial application, much resistance remains. Even where States accept the application of human rights law to armed conflict per se, they may continue to resist it in connection with armed conflicts beyond their borders to which they are a party.

D. Multinational NIACs: Whose Human Rights Law? Whose Domestic Law?

Closely related to the extraterritoriality issue—because such conflicts are by definition multinational—is the question of whose human rights law and whose domestic law to apply. What is meant by “whose human rights law?” Although human rights law is international law, States’ human rights law obligations vary in accordance with the human rights treaties to which they are party. Examples noted above are scope of application and derogation provisions. Where State A conducts detention operations in a NIAC on the territory of State B, which State’s human rights obligations are binding? The quandary is even more obvious with respect to domestic law. In Afghanistan, the United States conducted security detention pursuant to either/or both U.S. constitutional and statutory powers, but certainly not in conformity with Afghan law. President Karzai consistently and publicly voiced objections to U.S. detention practices on the ground that Afghanistan had no administrative detention law and that its constitution forbade detention outside the realm of criminal process.⁶² Whether he had a different message to the United States in private is, of course, possible, but even then it is questionable that a State can delegate to another State authority that it itself does not possess.

61. See Gabor Rona, *Obama Administration’s Position on the UN Torture Convention: New? Yes. Significant? Not So Much*, JUST SECURITY (Nov. 18, 2014), <http://justsecurity.org/17558/obama-administrations-position-torture-convention-new-yes-significant/#more-17558>.

62. See, e.g., Alissa J. Rubin & Douglas Schorzman, *Progress Seen in Resolving U.S.-Afghan Dispute Over Detainees*, NEW YORK TIMES (Sept. 20, 2012), <http://www.nytimes.com/2012/09/21/world/asia/obama-and-karzai-discuss-detention-of-terrorism-suspects-in-afghanistan.html?pagewanted=all> (“Mr. Karzai’s legal advisers told him that Afghan law had no provision for detention without trial.”).

E. Human Rights, Domestic Law and Non-State Actors

IHL operates on the principle of legal equality of the parties to the armed conflict. Friction around this principle often arises in connection with the separation of equities concerning the right to use force (*jus ad bellum*) and rules applicable for the use of force (*jus in bello*). The argument goes like this: customary international law and the UN Charter forbid the use of force in international relations save in individual or collective self-defense or when authorized by the UN Security Council. Why then should an aggressor State be entitled to benefit from the same IHL use of force privileges as the defending State? Answer: because IHL is not meant to either punish or reward parties to armed conflict, but, rather, to protect individuals. In the absence of equality of the parties, the impetus to obey IHL disappears. No party will either admit it is the aggressor, or agree to forego privileges of belligerency and other benefits of IHL because it is labeled the aggressor. While the obligation to abide by IHL is not conditioned on reciprocal respect for its rules by the opposing party, the agreement of States to be bound by IHL is conditioned on expectations of reciprocity of obligations, regardless of which party is the aggressor or defender.

The necessity of legal equality of parties to armed conflicts is just as applicable to questions of human rights law as it is to IHL. But while all parties to armed conflict are bound by IHL, only States are generally understood to have human rights law obligations. The equality of the parties to IACs is largely unaffected by the injection of human rights law in relation to detention powers. This is because the *lex specialis*, that is IHL, more-or-less occupies the field so there is precious little work for human rights law to do. But in NIACs, due to the absence of rules establishing grounds and procedures for detention, the complementary role of human rights law looms large. However, in NIACs, at least one of the parties to the conflict is a non-State actor that has no *de jure* human rights obligations.

A similar imbalance exists in connection with application of domestic law. A State can legislatively enact grounds and procedures for detention applicable in NIAC; a non-State armed group cannot.

For all these reasons, resort to human rights law for grounds and procedures applicable to NIAC detention leaves significant gaps in protection. Amendment of IHL applicable to NIACs could fill those gaps, but that is not likely to happen. It is noteworthy that while the ICRC has used several opportunities in recent years to address the problem of NIAC detention authority, it has never called for action by States to amend existing IHL

treaty provisions to either supply or clarify such authority. Instead, it appears more likely that efforts to advocate acceptance of application of human rights law to NIAC detention will bear more fruit than efforts to amend IHL.

IV. RECOMMENDATIONS TO DATE

There have been many attempts in recent years to “find” the law applicable to NIAC detention. Most have been unsatisfactory, due more often to the elusiveness of that law than to the lack of expertise of those in search of it. Here are a few of the leading examples.

A. The UN Human Rights Committee

On October 28, 2014 the Human Rights Committee issued General Comment 35 on Article 9 of the ICCPR.⁶³ The Comment addresses the power of States to derogate from their Article 9 obligations in accordance with Article 4, and notes, as well, that in IACs “substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention.”⁶⁴ But the Comment does not address NIAC detention.

B. The Leiden Policy Recommendations

The “Leiden Policy Recommendations on Counter-terrorism and International Law” likewise note that procedural guarantees for IAC detention are addressed in the applicable instruments of IHL, but draws no conclusions about NIACs.⁶⁵

63. U.N. Human Rights Committee, General Comment No. 35: Article 9: Liberty and Security of Person (advance unedited version), *available at* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/35&Lang=en (last visited Jan. 6, 2015) [hereinafter General Comment 35].

64. *Id.*, ¶ 66.

65. Nico Schrijver & Larissa Van Den Herik, *Leiden Policy Recommendations on Counter-Terrorism and International Law*, 57 NETHERLANDS INTERNATIONAL LAW REVIEW 531, ¶ 73 (2010), *available at* <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf> (“There are in certain circumstances particular challenges in implementing procedural safeguards for internment in non-international armed conflicts, which constitute the majority of armed conflicts today. This is an issue which merits further discussion at the international level and, if possible, the elaboration

C. The International Committee of the Red Cross

The ICRC has published two important documents on the subject of NIAC detention authority. The first one, from 2005–6, suggests that NIAC detention authority is inherent in IHL, largely as evidenced by references to detention in Common Article 3 and Additional Protocol II.⁶⁶ The second, in November 2014 reiterates the position expressed in 2005.⁶⁷ As previously noted, Debuf, a member of the ICRC Legal Division, does not agree. I believe she is correct.

D. The Copenhagen Process

Another effort is The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines.⁶⁸ The Principles and Guidelines published by this twenty-two State-led initiative raise a number of questions, but leave them unanswered. The document, which purports to apply only to NIACs, does assert in a preambular descriptive section that “(p)articipants recognized that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations.” Additionally, the Principles do set forth some procedural guarantees: the right to be informed of reasons for detention, to be “promptly registered,” the provision of notice to the ICRC and (where practicable) to family, and prompt initial review and periodic reconsideration by an impartial and objective authority. But the document leaves one to wonder if the list is exclusive for NIACs and if other procedural guarantees that are part of the human rights lexicon are therefore excluded. The

of specific rules or guidelines. In the interim, existing principles and safeguards, such as those proposed by the ICRC in 2005 may be relied on as minimum standards of due process in any type of detention for security reasons.”).

66. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375 (2005), available at <https://www.icrc.org/eng/resources/documents/publication/p0892.htm>.

67. International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges* (Opinion Paper, Nov. 2014), available at <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges#.VHx2RyiLGFYh>.

68. *The Copenhagen Process on the Handling of Detainees in International Military Operations* (2012), available at <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>.

document does not tackle the all-important underlying question: from whence does detention authority arise?

E. The UN Working Group on Arbitrary Detention

In 2012, the UN Working Group on Arbitrary Detention initiated

preparations concerning the draft basic principles and guidelines on remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The draft basic principles and guidelines aim at assisting Member States in fulfilling their obligation to avoid arbitrary deprivation of liberty.⁶⁹

The Working Group's December 2012 report to the Human Rights Council devotes several paragraphs to limitations on the right of derogation, but mentions armed conflict only once to assert that arbitrary detention is prohibited "both in times of peace and armed conflict."⁷⁰ There is no discussion of either the sources or content of law establishing grounds and procedures for armed conflict detention, let alone for NIAC detention. A report expected in 2015 may have more detail.

F. The Chatham House Initiative

Perhaps the most detailed focus on NIAC detention authority in all the initiatives to date can be found in the ICRC's report summarizing the discussions held at an Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict that took place under Chatham House and ICRC auspices in September 2008.⁷¹ The report deals first with grounds for detention:

69. U.N. Human Rights Committee, Report of the United Nations Working Group on Arbitrary Detention, ¶ 5, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf.

70. *Id.*, ¶ 45.

71. See Els Debuf, *Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 859 (2009), *available at* <https://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf>.

It seems to be clear that this ground [imperative reasons of security] is acceptable [as a basis for detention] under IHL, even in NIAC. However, it would not be acceptable under IHRL [international human rights law] due to the lack of specificity, which begs the question of whether the interning State must derogate from its relevant human rights obligations for internment not to be considered arbitrary detention.⁷²

But if derogation from human rights law-based protections against arbitrary detention is deemed permissible and the State has, in fact, derogated, this suggests that arbitrary detention is permitted in NIACs. Such is clearly not the case; that much is confirmed by Rule 99 of the customary IHL study.⁷³ Therefore, some other legal construct must take its place to establish not only grounds for detention, but also procedures that guarantee due process, as both are essential to protect against arbitrariness.

In the absence of explicit treaty law or applicable customary IHL, we are left with three options. First is a claim that customary international human rights law prohibits arbitrary detention in NIAC even if treaty human rights law does not apply. This would return us to the terms of human rights treaties as a starting point for determining custom. The circularity of this exercise also might explain why certain authorities are loathe to accept the derogability of relevant human rights law rules, despite treaty terms to the contrary.⁷⁴ The Chatham House experts did note that human rights law does not prohibit security detention, but did not appear to reach consensus on whether the content of human rights law protections may be dispensed with even if the *de jure* provisions are subject to derogation. They also appeared to agree on a rather detailed list of procedural guarantees (the right to be informed of reasons for deprivation of liberty, a qualified right to legal assistance and to appear in any proceeding, and the right to independent and impartial review of detention), but there was no mention of any of

72. *Id.* at 864. The report also notes that detention for purposes of interrogation and to gain a “bargaining chip” for negotiation of exchange of detainees would be impermissible. *Id.* at 865.

73. CIHL Study, *supra* note 12.

74. The Human Rights Committee’s General Comment 35, *supra* note 63, for example, first notes that “article 9 applies also in situations of armed conflict to which the rules of international humanitarian law are applicable” (¶ 64) and then concludes that “(t)he fundamental guarantee against arbitrary detention is non-derogable” (¶ 66). While failing to say it explicitly, the Committee is clearly and correctly concluding that the prohibition against arbitrary detention is applicable in IHL, and, for this reason, is not subject to derogation even though Article 9 is not one of the non-derogable rights listed in Article 4.

the experts' positions—let alone an indication of a consensus—on the legal sources of such rights. As for habeas corpus, the experts were apparently split on whether the human rights law-based guarantee applies. Interestingly, the “no” view expressed by a small minority was grounded on the now rather stale claim that human rights law does not apply either to armed conflict (“strong *lex specialis*/framework exclusion”) or to extraterritorial conflicts. A more nuanced assertion of derogability of habeas corpus rights was not offered.

A second option endorsed by the experts was the establishment of detention authority by Security Council resolution. This would, of course, have to be on an ad hoc basis and, as they noted, would also be subject to the vagaries of Security Council politics—hardly a satisfactory option.

The third option, also sanctioned by the experts, is simple in theory, but perhaps the most fraught in practice: amend applicable IHL treaty law.

In sum, these good-faith efforts to plug a significant legal hole that has developed with the advent of transnational NIACs have proved inadequate. Even the ICRC position, which stands in the minority by locating NIAC detention power in IHL, asserts that grounds and procedures authority must be articulated elsewhere.

V. THE LIKELY WAY FORWARD

The practical means to fill the NIAC detention regulation gap include action by the Security Council, amendment of international humanitarian law, and development of domestic law.

To the extent the Security Council is able to reach accord on matters within its Chapter VII powers relating to international peace and security and to then explicitly articulate grounds and procedures for detention on an ad hoc basis, there is a theoretical solution. But not all armed conflicts trigger Chapter VII powers, and even among those that do, action by the Security Council is hardly a given and may only be effective on an ad hoc basis.

Another option is to develop the IHL of NIACs to include grounds and procedures for detention. States party to the Geneva Conventions must first be convinced to begin a process to consider amending IHL treaty law. The political obstacles to such an agreement are tremendous. Assuming they are overcome, we would enter a minefield in which any number of established IHL protections and jurisprudence about the scope of

application of IHL and the relationship between IHL and international human rights law could be placed at risk.

The final option is authorization in domestic law that comports with human rights law protections. While it has certain drawbacks, it is also the most attractive in terms of achievability and degree of protection afforded.

There is already an established majority view in the international legal community that human rights law operates in armed conflict and extraterritorially when a State engages in detention. There appears to be little dissent from the view that basic guarantees of human rights law designed to prohibit arbitrary detention either are, or should be, respected in NIACs. While ICCPR Article 9(4) obliges detention review to be conducted by “a court,” it is not necessarily clear that the requirement is that of habeas corpus, namely the right to be brought before a judicial body. In situations of armed conflict, where such a process might be impracticable either due to the number of cases or the disintegration of judicial processes, or both, it is conceivable that the Article 9(4) requirement could be satisfied by a neutral and independent process conducted by a non-judicial body. The exclusivity of grounds for detention in ECHR Article 5 and the absence of armed conflict as a listed ground is also not an insurmountable obstacle. While amendment of the Convention is not likely, and attempting to do so would also be to enter a minefield, a solution might be found in the details of derogation. Consistent with, or perhaps as a compromise with emerging jurisprudence that either negates or limits the right to derogate from human rights law provisions that protect against arbitrary detention, there could be agreement on a “floor” of requirements of domestic legislation addressing grounds and procedures. The Chatham House initiative and the Copenhagen Process might be starting points to establish the list of protections required. Agreement by enough States on a uniform list of “floor” requirements could address the problem of transnational conflict and multinational forces.

None of this solves the problem of detention by non-State parties to armed conflict. All parties to armed conflict are subject to IHL, but only States are generally understood to have human rights law obligations. Therefore, the conundrum of non-State detention can only be solved by amending IHL, which as mentioned, is unlikely to happen. I have no suggested solution to this problem, but do note that it is more theoretical than practical. Detention by non-State armed groups, like participation in hostilities, may not be prohibited under IHL, but it is also not privileged in the sense of providing an exemption from domestic law. Just as non-State

fighters are prosecutable for domestic law crimes of murder and assault even if their targets are legitimate military objectives, they are prosecutable for kidnapping and unlawful detention. One might argue that adding “failure to provide due process” would weigh little on the conscience or risk assessment made by non-State fighters as they are already criminals. And it is also unlikely that States would legislatively establish the conditions that non-State actors must comply with to conduct operations that are *ab initio* criminal. But recall that IHL does require States to consider amnesty for mere participation in hostilities, but not for the commission of war crimes. Conceptually consistent with this notion, domestic legislation in the form of sentencing guidelines could provide either for reduction or enhancement of presumed sentences, depending on whether non-State actors engaging in detention met or violated the floor requirements.

This final option of focusing on domestic law solutions that comply with applicable human rights obligations is not perfect, but seems to be superior to others that have been proposed and is the one most likely to be acceptable to States.